Filed 1/11/13 Lloyd v. Metropolitan West Asset Management CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

BRUCE M. LLOYD, Plaintiff and Appellant, v. METROPOLITAN WEST ASSET MANAGEMENT, LLC, Defendant and Respondent.	B238724 (Los Angeles County Super. Ct. No. GC045879)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jan A. Pluim, Judge. Affirmed.

Ernster Law Offices, John H. Ernster and Ryan K. Marden for Plaintiff and Appellant.

Bryan Cave, Edward M. Rosenfeld and R. Andrew Chereck for Defendant and Respondent.

Plaintiff Bruce M. Lloyd appeals from the summary judgment entered in favor of defendant Metropolitan West Asset Management, LLC (Metro), in this action based on Metro's alleged failure to pay Lloyd pursuant to his contract to solicit clients for Metro's investment business. We affirm the judgment because the undisputed evidence shows that Lloyd violated federal disclosure regulations governing his solicitation activities. These violations would make any payment to him unlawful.

FACTS AND PROCEDURAL HISTORY

Metro is a Los Angeles-based investment advisory firm that is registered as an investment adviser subject to the federal Investment Advisers Act of 1940. (15 U.S.C. § 80b-1 et seq.; the Advisers Act.)

The Advisers Act prohibits any fraudulent transaction, practice, or course of business when dealing with a client or prospective client. (15 U.S.C. § 80b-6(1), (2), (4).) Pursuant to this provision, the Securities and Exchange Commission (SEC) promulgated a regulation in 1979 mandating certain disclosures by those who solicit clients on behalf of investment advisers subject to the Advisers Act like Metro. (17 C.F.R. § 275.206(4)-3 (2012).) Known as the Cash Solicitation Rule, it requires solicitors to provide two disclosure forms to prospective clients. The first, Part 2 of SEC Form ADV, contains information about the investment advisory firm, including the identity of its principal owner, the types of services offered, and the amount of client assets managed. The second concerns the solicitor, the nature of his relationship with the investment advisory firm, the terms of his compensation, and the extra amount, if any, the client will be charged as a result. (17 C.F.R. § 275.206(4)-3(b).)

Under the Cash Solicitation Rule, it is unlawful for an investment adviser to pay a cash fee for solicitation activities unless the fee is paid pursuant to a written agreement that requires the solicitor to comply with these disclosure requirements "at the time of any solicitation activities." (17 C.F.R. § 275.206(4)-3(a)(2)(iii)(A)(3).) It is also unlawful for an investment adviser to pay a cash fee to a solicitor unless the client procured by the solicitor provides the investment firm with a signed and dated

acknowledgment of receipt of the two required disclosure forms before or at the time of entering an investment advisory contract. (17 C.F.R. § 275.206(4)-3(a)(2)(iii)(B).)

Bruce M. Lloyd had lengthy experience soliciting clients on behalf of investment management firms, specializing in clients in Europe, the Middle East, and Africa. In March 2005, Lloyd and Metro executed a written agreement by which Lloyd would solicit clients on Metro's behalf. Metro agreed to pay Lloyd a monthly retainer of $3,500 for his services, along with a referral fee for each client he brought to Metro. The agreement incorporated the Cash Solicitation Rule, attached copies of the required disclosure forms, and stated that Lloyd's right to compensation was contingent upon his compliance with the Cash Solicitation Rule.

After the solicitation agreement was signed, Lloyd began soliciting clients for Metro, but was unsuccessful in doing so. In May 2006, Metro told Lloyd it would no longer pay him the $3,500 monthly retainer fee, but would pay a referral fee for any clients he solicited who actually brought their investment business to Metro. Lloyd continued to solicit clients, including a Swiss financial institution known as Pictet & Cie.

In August 2008, Metro notified Lloyd both orally and by e-mail that it was terminating the solicitation agreement. Even so, Lloyd continued his efforts to solicit Pictet as a client for Metro into February 2009. All told, Lloyd met with representatives of Pictet 17 times in Switzerland and twice in Los Angeles on behalf of Metro. In May 2009, Pictet decided to invest with Metro.

In 2010, Lloyd asked Metro to compensate him for bringing Pictet to Metro. When Metro refused, Lloyd sued, alleging several causes of action based on Metro's failure to pay him a monthly retainer fee after 2006 and its refusal to pay a referral fee for the Pictet deal: breach of written, oral, and implied-in-fact contracts; breach of the covenant of good faith and fair dealing; a common count for services rendered; concealment; fraud; false promises; and negligent misrepresentation.

During discovery, Lloyd testified at his deposition that he never provided Pictet or any other company he solicited on Metro's behalf with the disclosure documents required by the Cash Solicitation Rule. Lloyd said this was in accord with his understanding of

the industry practice not to do so until a deal with the client was virtually consummated and the investment agreement was about to be signed.

Based on this admission, Metro brought a summary judgment motion contending that Lloyd was not entitled to compensation under the solicitation agreement because he failed to comply with the Cash Solicitation Rule. Doing so would not only be unlawful under that rule, it was also not allowed under the solicitation agreement, which made Lloyd's compliance with the Cash Solicitation Rule a condition precedent to any payments.

Lloyd's opposition points and authorities raised two grounds concerning the Cash Solicitation Rule: (1) Metro provided no authority showing that the rule applied when soliciting foreign investors; and (2) Lloyd complied with the rule, based on paragraph 19 of his accompanying declaration, where he stated that it was his "recollection that [he] provided Pictet with the [required disclosure forms]" sometime before May 2007.[1] Metro objected to this statement on the ground that it contradicted his sworn deposition testimony that he never provided those documents to Pictet or any other prospective clients he solicited on Metro's behalf. The trial court sustained that objection,[2] and then

---

[1] Lloyd's opposition points and authorities also argued that Metro could not orally modify the solicitation agreement, and that Metro's e-mail and oral notices that it was terminating the contract did not comply with the contract's notice requirements. Lloyd testified at his deposition that he never complained to Metro after it orally modified the contract in 2006 and stopped paying the monthly retainer, and that when he was told the contract was being terminated, he agreed to that statement. Although Lloyd raises these same two issues on appeal, because we hold that the Cash Solicitation Rule operates as a complete defense to Lloyd's action, we need not address them.

[2] Although Lloyd relies on this paragraph from his declaration in his appellate briefs, he does not address or in any manner challenge the trial court's evidentiary ruling. As we discuss in part A. of our DISCUSSION, the issue is therefore waived. Lloyd's summary judgment opposition papers were also supported by the expert witness declaration of attorney Naomi Friedland -Wechsler, who claimed to have experience with the Cash Solicitation Rule through her representation of clients in the financial industry, and who opined that Lloyd complied with that rule, and that the rule did not apply outside the United States. Evidentiary objections by Metro were sustained to this declaration to the extent they relied on Lloyd's declaration, and to the extent that she opined the Cash

granted summary judgment based on Lloyd's noncompliance with the Cash Solicitation Rule.

STANDARD OF REVIEW

Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) In reviewing an order granting summary judgment, we must assume the role of the trial court and redetermine the merits of the motion. In doing so, we must strictly scrutinize the moving party's papers. The declarations of the party opposing summary judgment, however, are liberally construed to determine the existence of triable issues of fact. All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. While the appellate court must review a summary judgment motion by the same standards as the trial court, it must independently determine as a matter of law the construction and effect of the facts presented. (*S.M. v. Los Angeles Unified School Dist.* (2010) 184 Cal.App.4th 712, 716.) Accordingly, we are not bound by the trial court's stated reasons and review only the ruling, not its rationale. (*Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1092.)

A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action if that party has shown that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subds. (o)(2), (p)(2).) If the defendant does so, the burden shifts back to the plaintiff to show that a triable issue of fact exists as to that cause of action or defense. In doing so, the plaintiff cannot rely on the mere allegations or denial of her pleadings, "but, instead, shall set forth the specific facts showing that a

---

Solicitation Rule did not apply to foreign investors. On appeal, although Lloyd refers to the expert's opinion that the Cash Solicitation Rule does not apply to foreign investors, he fails to address or challenge the trial court's evidentiary ruling. We will therefore disregard that declaration as well.

triable issue of material fact exists . . . ." (*Id.*, subd. (p)(2).) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

DISCUSSION

On appeal, Lloyd raises three arguments concerning the applicability of the Cash Solicitation Rule: (1) based on paragraph 19 of his declaration, he in fact complied with the Cash Solicitation Rule; (2) not until the hearing on its summary judgment motion did Metro contend that the rule applied to the monthly retainer fee, making it unfair to grant summary judgment in the first instance, or for this court to affirm the judgment; and (3) Metro did not show that the Cash Solicitation Rule applied when soliciting overseas investors. In his appellate reply brief, Lloyd amplifies the second contention, asserting that payment of the monthly retainer would not violate the Cash Solicitation Rule, or the terms of the solicitation agreement that incorporated that rule. We take each in turn.

A. We Must Disregard Lloyd's Self-serving Statement in His Declaration Concerning His Supposed Compliance With the Cash Solicitation Rule

A party's self-serving declarations submitted in opposition to a summary judgment motion that contradict his sworn deposition testimony should be disregarded. (*Archdale v. American Internat. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 473.) Although the trial court sustained Metro's objection to paragraph 19 of Lloyd's declaration on this ground, Lloyd has not mentioned or attempted to challenge that ruling on appeal. Accordingly, the issue is waived. (*Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1492.) As a result, the only evidence supporting Lloyd's

contention that he complied with the disclosure requirements of the Cash Solicitation Rule disappears, leading us to reject this contention.[3]

B. Metro's Supposed Failure to Timely Raise the Retainer Fee Issue

Although Lloyd contends that Metro did not raise the Cash Solicitation Rule's applicability to the monthly retainer fee until the hearing on its summary judgment motion, he does not cite to where in the reporter's transcript that occurred. We struck Lloyd's first appellate brief for its failure to provide record citations. (Cal. Rules of Court, rule 8.204(a)(1)(C).) Although his revised appellate brief included numerous record citations, it omitted this one. We therefore deem the issue waived. (*Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 79.)[4]

Alternatively, while it is true that Metro's summary judgment points and authorities focused on Lloyd's right to a referral fee, we believe the retainer fee issue was fairly encompassed within Metro's moving points and authorities. Lloyd's first amended complaint alleged that he was entitled to both the retainer fee and the referral fee, and Metro's notice of motion contended that under the Cash Solicitation Rule it would be

---

[3] It is important to note at this juncture the issues Lloyd does not contest on appeal. Apart from his assertion that the Cash Solicitation Rule does not apply to his monthly retainer fee, he does not dispute that if he in fact violated the Cash Solicitation Rule, then he is not entitled to compensation pursuant to both that rule and the terms of the solicitation agreement. Nor does he dispute that he was obligated to provide the required disclosure documents when he first solicited clients for Metro. (17 C.F.R. § 275.206(4)-3(a)(2)(iii)(A) [solicitors must be required to present forms "at the time of any solicitation activities"].) Finally, he does not dispute that if he violated the Cash Solicitation Rule, then he is not entitled to recover under any of his causes of action.

[4] It appears that Lloyd was the first to raise the issue at the summary judgment hearing, when his counsel led off his argument by stating that the dispute involved not just the referral fee, but the monthly retainer fee as well. Lloyd's counsel argued that Metro's purported oral modification of the solicitation agreement by stopping the retainer fee payments was ineffective. Counsel for Metro responded that the Cash Solicitation Rule was all-inclusive and barred any cash payments when the rule was violated, including the retainer fee. At no time did Lloyd object that the retainer fee issue had not been raised before the hearing or was otherwise not properly before the trial court.

unlawful to pay Lloyd "the cash sum he seeks to recover in this action." Furthermore, in its statement of undisputed facts, in Fact No. 27, Metro contended that under section 2.1.2(a) of the solicitation agreement, Lloyd's failure to provide disclosure documents to Pictet meant he was not "entitled to receive any compensation from [Metro] pursuant to Article 3" of that agreement. Article 3 of the solicitation agreement is divided into subsections concerning Lloyd's separate rights to referral and monthly retainer fees, and his loss of those rights should he fail to comply with the Cash Solicitation Rule. Based on this, we conclude the issue was properly before the trial court.

C. The Cash Solicitation Rule Applies to the Monthly Retainer Fee

Lloyd contends that triable issues of fact remain concerning his right to his unpaid monthly retainer fees because the solicitation agreement does not make his right to those fees contingent on his compliance with the Cash Solicitation Rule. He points to section 3.1.1 of the agreement, which governs the retainer fee, and is silent on the issue of the Cash Solicitation Rule. By contrast, Lloyd notes, section 3.1.2, which governs referral fees, expressly states that Metro was not obligated to pay those fees if Lloyd did not comply with the Cash Solicitation Rule.

The short answer to this contention is found in the Cash Solicitation Rule, which makes unlawful the payment of cash fees "with respect to solicitation activities" if the rule has been violated. (17 C.F.R. § 275.206(4)-3(a).) The sole purpose of the solicitation agreement was for Lloyd to refer prospective clients to Metro – in other words, to perform solicitation activities. Section 3.1 of the agreement, which included both referral and retainer fees, was described as a schedule of "compensation for Solicitor's services hereunder." Nor does Lloyd dispute that his monthly activities concerned anything other than solicitation activities. Therefore, the monthly retainer fee did compensate Lloyd for solicitation activities.

A somewhat longer answer comes from the solicitation agreement itself. Even though referral fees under section 3.1.2 were made expressly contingent on compliance with the Cash Solicitation Rule, while section 3.1.1 for the retainer fee did not mention

that rule, section 2.1.2, under the subheading "Conformity with Advisers Act," clarified that the retainer fee was subject to the same condition. Under section 2.1.2, subdivision (a), headed "Procedures for Referral Fees," the agreement said that Lloyd "shall not be entitled to receive *any compensation* from [Metro] *pursuant to Article 3* . . . unless and until" compliance with the Cash Solicitation Rule has occurred. (Italics added.) This provision does not distinguish between the section 3 subdivisions for referral and retainer fees. Instead, it applies to fees under section 3 as a whole. We therefore conclude that even under the parties' contract, Lloyd's right to receive retainer fees was subject to his compliance with the Cash Solicitation Rule.

D. The Cash Solicitation Rule Applies When Soliciting Foreign Investors

Lloyd contends that Metro's summary judgment motion did not address the issue of whether the Cash Solicitation Rule applied to the solicitation of foreign investors. Metro's separate statement of undisputed facts included the following: Lloyd lives in Los Angeles County; Metro's principal place of business is in Los Angeles County; Metro is registered under, and is subject to, the Advisers Act; and Lloyd solicited Pictet at meetings in Switzerland and Los Angeles. Lloyd did not dispute these facts. The Cash Solicitation Rule applies to any investment adviser registered under the Advisers Act. (17 C.F.R. § 275.206(4)-3(a).)

Lloyd's summary judgment opposition papers contended this was insufficient to show that the Cash Solicitation Rule applied to foreign investors, citing to the declaration of lawyer Friedland-Wechsler, who opined that she was aware of no legal authority for such a proposition.[5] In reply, Metro pointed to the undisputed facts mentioned above, as well as to an SEC document stating its position that the Advisers Act applied "everywhere" to any investment adviser subject to that act. The trial court expressly

---

[5] As noted earlier, the trial court sustained Metro's evidentiary objection to that portion of Friedland-Wechsler's declaration, a ruling that Lloyd has waived by failing to challenge it on appeal. We therefore disregard Lloyd's appellate argument to the extent it is based on that opinion. (*Jessen v. Mentor Corp.*, *supra*, 158 Cal.App.4th at p. 1492.)

ruled on the issue, finding that the Cash Solicitation Rule applied because Metro was located in Los Angeles and was a registered adviser under the Advisers Act. Based on this, we conclude that the issue was squarely raised by Metro and supported by references to both the facts and legal authority.

As for whether the trial court's ruling was correct, it is Lloyd who fails to cite any authority for the proposition that the Cash Solicitation Rule does not apply when soliciting foreign investors. Several federal district courts have concluded that the Advisers Act does apply to the activities of domestic investment firms registered under that Act. (*S.E.C. v. Gruss* (S.D.N.Y. 2012) 859 F.Supp.2d 653, 662-664 [finding that 15 U.S.C. § 80b-6, pursuant to which the Cash Solicitation Rule was promulgated, applies even as to foreign clients]; *S.E.C. v. ICP Asset Management, LLC* (S.D.N.Y. June 21, 2012, No. 10 Civ. 4791(LAK)) 2012 WL 2359830 [same].)[6] Based on these authorities, we conclude that the Cash Solicitation Rule applied because Metro was a Los Angeles-based investment adviser registered pursuant to the Advisers Act, Lloyd was a Los Angeles-based solicitor performing referral services for Metro under an agreement subject to that act, and some of Lloyd's solicitation activities occurred in the Los Angeles area.[7]

---

[6] Although not binding, we may rely on unpublished decisions of a federal district court as persuasive authority. (*Aleman v. AirTouch Cellular* (2012) 209 Cal.App.4th 556, 576, fn. 8.)

[7] Metro filed a motion asking us to impose sanctions on Lloyd and his appellate counsel because Lloyd's appellate briefs relied on portions of Lloyd's supporting declarations that had been stricken by the trial court, failed to mention that the trial court had sustained evidentiary objections to those statements, did not challenge the trial court's evidentiary rulings, argued that there was no authority for the proposition that the Cash Solicitation Rule applied to conduct aimed at foreign investors, while ignoring the administrative and decisional authority cited by Metro to the contrary, filed an initial appellate brief devoid of any record citations, misrepresented or ignored the text of the solicitation agreement, and otherwise tried to mislead this court.

We may impose sanctions for: (1) taking a frivolous appeal solely to cause delay; (2) including in the record any matter not reasonably material to the appeal's

DISPOSITION

The summary judgment is affirmed. Respondent Metro shall recover its appellate costs. Metro's motion for sanctions on appeal is denied.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.

---

determination; (3) filing a frivolous motion; or (4) committing any other unreasonable violation of the appellate rules. (Cal. Rules of Court, rule 8.276(a)(1)-(4).) Sanctions should be used most sparingly to deter only the most egregious conduct, and lack of merit alone does not establish that it is frivolous. (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1261-1262.) An appeal is frivolous only when pursued for an improper motive – to harass the respondent or delay an adverse judgment – or when it indisputably has no merit – when any reasonable attorney would agree the appeal is absolutely without merit. (*Id.* at p. 1262.)

Although we understand Metro's concerns about the quality of Lloyd's appellate briefs, the accuracy of his record citations, and the completeness and correctness of his legal analyses, we do not believe this is a case where briefing slipped over the line to sanctionable conduct. We therefore deny the sanctions motion.